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Decision

Matter of: Omniplex World Services Corporation

File: B-290996.2

Date: January 27, 2003

Katherine S. Nucci, Esq., and Timothy Sullivan, Esq., Thompson Coburn, for the protester.

Elizabeth Gaffin, Esq., Department of Justice, for the agency.

Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's determination to eliminate a proposal for a custody officer services contract from the competitive range, based solely on a minimum requirement for direct corporate experience that was neither stated in the solicitation nor disclosed to offerors prior to proposal submission, was improper.

DECISION

Omniplex World Services Corporation protests the elimination of its proposal from the competitive range under request for proposals (RFP) No. ACB-2-R-0029, issued by the Immigration & Naturalization Service (INS), Department of Justice, for custody officer services at the Krome Service Processing Center and the Miami International Airport, in Miami, Florida. Omniplex protests the evaluation of its experience as technically unacceptable.

We sustain the protest.

The RFP, issued May 17, 2002, contemplated the award of a fixed-price requirements contract for 1 year with 4 option years. The RFP stated that the technical factors, when combined, were slightly more important than price. RFP § M.2(a). The technical factors and their corresponding weights were as follows:

1. Experience/Past Performance
 - a. Experience (30 points)

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|---------------------------|----------------------------------|
| b. Past Performance | (Adjectival Rating) ¹ |
| 2. Key Personnel/Staffing | (30 points) |
| 3. Financial Capability | (20 points) |
| 4. Quality Control Plan | (10 points) |
| 5. Training | (5 points) |
| 6. Records & Reports | (5 points). |

RFP § M.2(c).

With regard to the experience subfactor, the RFP's proposal instructions requested offerors to describe their experience providing "similar or related" services to those stated in the RFP, and "the extent to which the experience was/is similar to the requirements identified by this RFP." The RFP also requested offerors to demonstrate their "ability to manage custody officers in a medium to large-scale facility," and requested information about the number of persons guarded or secured under prior contracts. RFP § L.13(a.1).

The RFP stated that the evaluation under the experience/past performance factor would be subjective and based on consideration of all relevant facts and circumstances, in order to determine whether an offeror "has experience that will enhance its technical and managerial capability to perform." The experience subfactor was stated as follows:

The Offeror's guard/custody officer experience that is similar in size, scope, and complexity will be evaluated to determine the capability to perform the work under this contract.

RFP § M.3(a)(1). The RFP did not define the term "guard"; it did, however, define

¹ The RFP stated that past performance would receive an adjectival rating from "Very Low to Very High Performance Risk." RFP § M.2(c). The RFP also stated the following:

No Past Performance - Offerors with no past performance will receive a neutral rating. Such a rating will have no positive or negative evaluative significance. However, Offerors are encouraged to provide past performance information from predecessor companies, subcontracts, key personnel who have relevant experience or other past performance information such as relevant state and local government contracts, and commercial contracts.

RFP § M.3(a)(3). The RFP did not state the relative importance of the past performance subfactor, as required. Federal Acquisition Regulation § 15.304(d); see Stone & Webster Eng'g Corp., B-255286.2, Apr. 12, 1994, 94-1 CPD ¶ 306 at 5.

“custody officer” in the performance work statement (PWS) as follows:

Contractor’s uniformed unarmed employees responsible for the security, care, and supervision of detainees being detained or under INS proceedings. The officer is also responsible for the safety and security of the facility.

RFP § C.1.D. The PWS also stated minimum personnel qualification standards, including that all contract employees shall have a minimum of either 1 year of experience as a law enforcement officer or military policeman, or 6 months experience as a security officer engaged in functions related to detaining civil or administrative detainees. RFP § C.2.2.C.2.

The agency received 16 proposals by the June 20 closing date, which were evaluated by a technical evaluation panel (TEP). Following a competitive range determination on July 17 that eliminated Omniplex’s “acceptable” proposal from the competitive range, Omniplex protested to our Office. Agency Report, Exh. G, Tab F, First Competitive Range Determination. In response to the protest, the agency took corrective action that included establishing a new TEP and re-evaluating proposals. Agency Report at 5. On August 19, our Office dismissed that protest as academic.

On September 10, an entirely new TEP evaluated the proposals.² Prior to this evaluation, the TEP devised scoring criteria under each evaluation factor/subfactor. These criteria were not shared with the offerors. With regard to experience, the TEP stated:

Points were allotted to offerors who demonstrated experience in providing custody officers to oversee the detention/custody of detainees. Custody Officers were defined as those having responsibility for the security, care, and supervision of detainees in a custody setting. Custody Officers differ from Guards in that they must have training and experience in dealing with a detained population. Custody Officers must have the knowledge and ability to deal with conflicts between detainees and potential violent behavior; and must have the capability to utilize verbal or physical means to control a potentially dangerous situation. Guards are defined as having the responsibility of ensuring the security of administrative buildings. Guards are not used for areas with detainee contact.³ For purposes

² One offeror had been debarred from government contracting in the interim, so the new TEP evaluated only 15 of the 16 proposals submitted. Agency Report, Exh. G, Tab F, Second Competitive Range Determination, at 1.

³ As noted above, no definition of “guard” appears in the RFP.

of this solicitation, guards are not acceptable substitutes for custody officers.

POINTS

0 points – No experience. Offeror has no experience in the detention/custody of detainees. Experience in physical security (*i.e.*, administrative buildings) does not constitute experience for this solicitation. Offerors with no experience will be deemed unacceptable.

Agency Report, Exh. G, Tab B, TEP Evaluation Documents, at 4-5. Under past performance, the TEP gave neutral ratings to all offerors found to have no detention/custody experience. *Id.* at 7.

Based on this scheme, the TEP determined that eight proposals, including Omniplex's, were unacceptable for lack of detention/custody experience. *Id.* at 1, 21, 27-39. That is, although Omniplex's proposal provided detailed information on numerous INS and other federal and corporate contracts for the past 12 years covering armed and unarmed guard and security services at medium to large-scale facilities,⁴ Agency Report, Exh. B, Omniplex Proposal, Vol. II, Section 1, Experience, Omniplex's proposal received zero points for experience, and was determined unacceptable overall because of its lack of corporate experience in providing detention/custody services.⁵

The TEP gave Omniplex [DELETED] factor. Agency Report, Exh. G, Tab B, TEP Evaluation Documents, at 1, 21-22. Most notably, the TEP determined that, under the key personnel/staffing factor, Omniplex's proposal set forth a [DELETED] that covered all of the requirements, and proposed key personnel with "[DELETED]." *Id.* at 21, 274-75.

On October 10, the contracting officer established a competitive range comprised of three proposals.⁶ Agency Report, Exh. G, Tab F, Second Competitive Range Determination. On October 17, Omniplex filed this protest.

⁴ Omniplex's proposal also stated that it has [DELETED] on some federal contracts.

⁵ Omniplex also received a "neutral" past performance rating because the agency concluded that none of its experience was relevant.

⁶ Price was not considered in making the competitive range determination. The RFP stated that the agency would evaluate the prices only of those proposals that had been "officially placed in" the competitive range. RFP § M.4. However, cost or price to the government must be included in every RFP as an evaluation factor, and agencies must consider cost or price to the government in evaluating competitive proposals. 41 U.S.C. § 253a(c)(1)(B) (2000). It is well established that this

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The protester essentially alleges that the agency improperly evaluated Omniplex's proposal as unacceptable by applying an unstated minimum requirement for experience in providing detention/custody services. We agree.

It is fundamental that offerors must be advised of the bases upon which their proposals will be evaluated. H.J. Group Ventures, Inc., B-246139, Feb. 19, 1992, 92-1 CPD ¶ 203 at 4. Therefore, an evaluation based on unstated minimum requirements is improper. RJO Enters., Inc., B-260126.2, July 20, 1995, 95-2 CPD ¶ 93 at 11; Sci-Tec Gauging, Inc.; Sarasota Measurements & Controls, Inc., B-252406, B-252406.2, June 25, 1993, 93-1 CPD ¶ 494 at 7-8.

Here, the agency eliminated the proposals of Omniplex and other offerors on the sole basis that they did not have direct corporate experience in performing detention/custody services. By doing so, the agency essentially determined that direct corporate experience in detention/custody services was a minimum agency requirement. However, the RFP did not state this requirement. Nor did the agency otherwise advise potential offerors of such a requirement. Rather, the evaluation plan in the RFP stated that the agency would evaluate "guard/custody officer" experience similar in size, scope and complexity to the RFP work requirements. RFP § M.3(a)(1). That is, the RFP indicated that "guard" experience, as well as "custody officer" experience, would be considered in evaluating experience⁷ (although it did not define the term "guard").⁸ Also, "custody officers" under this RFP were said to be "also responsible for the safety and security of the facility," which indicates such experience is relevant. RFP § C.1.D. Thus, we think that an offeror's building security guard experience, such as that evidenced in Omniplex's proposal, should have been considered in the evaluation, and that it was improper to simply eliminate Omniplex from the competition because it did not have custody officer experience.

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requirement means that an agency cannot eliminate a technically acceptable proposal from consideration for award without taking into account the relative cost of the proposal to the government. Kathpal Tech., Inc.; Computer & Hi-Tech Mgmt., Inc., B-283137.3 et al., Dec. 30, 1999, 2000 CPD ¶ 6 at 9, aff'd, Department of Commerce—Request for Modification of Recommendation, B-283137.7, Feb. 14, 2000, 2000 CPD ¶ 27.

⁷ The use of the slash (or "virgule") between the words "guard" and "custody officer" reasonably indicated that either guard or custody officer experience was acceptable. See Airpro Equip. Inc., B-209612, Jan. 31, 1983, 83-1 CPD ¶ 105 at 1-2.

⁸ As noted above, the TEP defined "guard" as "having the responsibility of ensuring the security of administrative buildings."

The agency's action here effectively restricted the competition to firms with direct corporate detention/custody experience and represents the application of an unstated minimum requirement in the evaluation. If this represented the agency's actual minimum needs, the agency was required to amend the RFP to reflect those needs.⁹ FAR § 15.206(a); Canberra Indus., Inc., B-271016, June 5, 1996, 96-1 CPD ¶ 269 at 4.

Absent amendment of the RFP, the agency must reasonably evaluate offerors' experience in accordance with the terms of the RFP.¹⁰ On this record, we find no reasonable basis for Omniplex's zero point score and unacceptable rating under the experience criterion, and thus find the competitive range determination not reasonably supported by the record.

We recommend that the agency re-evaluate the proposals consistent with the terms of the RFP and make a new competitive range determination, appropriately taking into account the proposed prices and past performance. If, however, the terms of the RFP do not reflect the agency's actual minimum needs, the agency should first amend the RFP accordingly and request revised proposals. We also recommend that the agency reimburse the protester its cost of pursuing this protest, including reasonable attorney's fees. 4 C.F.R. § 21.8(d) (2002). The protester should submit its

⁹ Omniplex argues that a minimum requirement for direct corporate experience in performing detention/custody services would be unreasonable. We expect that the agency will carefully consider the protester's position when reviewing and determining the agency's actual minimum needs as recommended below. If the agency determines that it does require a minimum requirement for corporate custody officer experience and amends the RFP accordingly, the protester would of course have the opportunity to protest the amended terms of the RFP.

¹⁰ Although the RFP did not require direct corporate detention/custody experience, it did indicate a preference, which reasonably would permit the agency to evaluate such direct corporate experience higher than other relevant general experience. In this regard, an agency properly may take into consideration specific, albeit not expressly identified, experience in making qualitative distinctions between competing proposals, so long as the specific experience is logically encompassed by or related to an RFP's requirements and stated basis for evaluation. Bulova Techs. LLC, B-281384, B-281384.2, Feb. 3, 1999, 99-1 CPD ¶ 99 at 7-8; see, e.g., Sage Diagnostics, B-222427, July 21, 1986, 86-2 CPD ¶ 85 at 3 (higher rating for experience that directly related to the agency's specific law enforcement needs is reasonable, even though such direct experience was not a requirement). We also note that an agency properly may consider the specific experience of the offeror's proposed personnel in evaluating the offeror's experience. Scipar, Inc. B-220645, Feb. 11, 1986, 86-1 CPD ¶ 153 at 10; Energy and Res. Consultants, Inc., B-205636, Sept. 22, 1982, 82-2 CPD ¶ 258 at 3. In this regard, as the agency's evaluation determined, Omniplex [DELETED].

certified claim for costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days of receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.

Anthony H. Gamboa
General Counsel